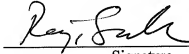


<b>PRE-APPEAL BRIEF REQUEST FOR REVIEW</b>		Docket Number Q86091	
Mail Stop AF Commissioner for Patents P.O. Box 1450 Alexandria, VA 22313-1450	Application Number	Filed	
	10/525,224	February 22, 2005	
	First Named Inventor		
	Firmin GARCIA		
	Art Unit	Examiner	
	3754	Lien M. NGO	
<p style="text-align: center;">WASHINGTON OFFICE <b>23373</b> CUSTOMER NUMBER</p>			
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal</p> <p>The review is requested for the reasons(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p> <p><input checked="" type="checkbox"/> I am an attorney or agent of record.</p> <p>Registration number <u>43,078</u></p> <div style="text-align: right;">         Signature     </div> <div style="text-align: right;"> <u>Raja N. Saliba</u>        Typed or printed name     </div> <div style="text-align: right;"> <u>(202) 293-7060</u>        Telephone number     </div> <div style="text-align: right;"> <u>February 10, 2009</u>        Date     </div>			

**PATENT APPLICATION**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re application of

Docket No: Q86091

Firmin GARCIA, et al.

Appln. No.: 10/525,224

Group Art Unit: 3754

Confirmation No.: 5613

Examiner: Lien M. NGO

Filed: February 22, 2005

For: FLUID PRODUCT DISPENSING ELEMENT AND DISPENSER COMPRISING ONE  
SUCH ELEMENT

**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

**MAIL STOP AF - PATENTS**

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

Sir:

Pursuant to the Pre-Appeal Brief Conference Pilot Program, and further to the  
Examiner's Final Office Action dated September 10, 2008, Applicant files this Pre-Appeal Brief  
Request for Review. This Request is also accompanied by the filing of a Notice of Appeal.

Applicant turns now to the rejections at issue:

**I. Status of the Application**

1. Claims 1, 2, 4-8, and 14-19 are rejected under 35 U.S.C. § 103(a) as allegedly being  
unpatentable over Knickerbocker (US 4,252,507).

2. Claims 1, 2, 9, 10 and 20-23 are rejected under 35 U.S.C. § 103(a) as allegedly being  
unpatentable over Garcia et al. (US 6,398,079) in view of Knickerbocker (US 4,252,507).

**II. Claim Rejections - 35 U.S.C. § 103(a)**

In rejecting claims 1, 2, 4-8 and 14-19 over Knickerbocker, the grounds of rejection state:

Knickerbocker discloses, in figs. 1, a fluid dispenser comprising a fluid reservoir and dispenser member comprising a body 59 defining a chamber; an actuator rod 22; a peripheral bearing collar including a gasket (G) coming into abutment at least indirectly against an edge of an opening of the fluid reservoir; wherein the axial height between the bottom face of the collar and the top end of the actuator rod is substantially equal to the axial height between the bottom face of the collar and the bottom of the body and substantially equal to the axial height of a neck of the reservoir; a dispensing head 16 mounted on top of the rod.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the height and diameter of claimed components of the fluid dispenser of Knickerbocker as claimed, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges or values involves only routine skill in the art. In re Aller, 105 USPQ 233.

(Final Office Action, dated Sept. 10, 2008, page 2.)

Applicant responds that the Examiner improperly relies on the drawings of Knickerbocker as disclosing “wherein the axial height HS1 between the bottom face of the collar and the top end of the actuator rod is substantially equal to the axial height HII between the bottom face of the collar and the bottom end of the body” and “wherein HS1 and HII are all about 7 mm to 9 mm” and “wherein the axial height HC of the neck is about 7 mm to 9 mm.” It is well established that “arguments based on drawings not *explicitly* drawn to scale in issued patents are unavailing.” *Nystrom v. Trex Co.*, 424 F.3d 1136, 1149 (Fed. Cir. 2005)(emphasis added). Further, “[a]bsent any written description in the specification of quantitative values, arguments based on measurement of a drawing are of little value.” *In re Wright*, 569 F.2d 1124,

1127 (C.C.P.A. 1977). Knickerbocker does not indicate that Figure 1 is made to scale nor does it describe any quantification of the dimensions of the device in the specification. Thus, Knickerbocker cannot properly be considered as disclosing the claimed dimensions or the relationships between the dimensions as recited in independent claim 1.

Even if, for the sake of argument alone, one were to measure Figure 1 of Knickerbocker, Knickerbocker still does not disclose the relationships between the recited dimensions in claims 1 and 2. As shown in the annotated Figure 1 of Knickerbocker attached to the Response to the Final Office Action, the dimensions of Figure 1 disclose that:  $HS1 = 4.1$  cm; and  $HI1 = 7.3$  cm. Thus, in Knickerbocker  $HS1 \neq HI1$ . As such, even if one improperly relies on the patent figures as does the Examiner in the grounds of rejection, Knickerbocker does not disclose the features of claim 1. To the contrary, it teaches away from the claimed subject matter.

Additionally, claim 1 indicates that the height of the neck HC ("about 7 mm to 9 mm") is approximately equal to the inside diameter of the neck Di ("8 mm") and that the outer diameter of the neck Do ("about 13 mm") is greater than the height of the neck HC ("about 7 mm to 9 mm"). Stated in other terms, claim 1 recites that  $Do > HC$  and  $HC \approx Di$ . Knickerbocker does not disclose such relationships between the dimensions. As apparent from the annotated Figure 1 of Knickerbocker, even if one were to improperly rely on the patent figures as does the Examiner, Figure 1 of Knickerbocker discloses that:  $HC = 5.5$  cm;  $Di = 3.1$  cm; and  $Do = 4.8$  cm. Thus, if the figures had been disclosed as being to scale, Knickerbocker discloses that  $HC > Do > Di$ . In view of the above, Applicants respectfully submit that Knickerbocker does not disclose the claimed relationships between the dimensions HS1, HI1, HC, Do, and Di.

The Examiner further alleges that it would have been obvious through routine experimentation to achieve the recited height and diameter of the components in claims 1 and 2. However, “[a] particular parameter must first be recognized as a result-effective variable, i.e., a variable which achieves a recognized result, before the determination of the optimum or workable ranges of said variable might be characterized as routine experimentation.” MPEP § 2144.05(II)(B) (citing *In re Antoine*, 559 F.2d 618, 195 USPQ 6 (CCPA 1977)). Nothing in Knickerbocker indicates that the relationship between the claimed dimensions is result-effective. Knickerbocker does not mention the claimed dimensions, let alone the relationship between the dimensions. In fact, Knickerbocker does not disclose any dimensions for any aspect of the device. As such, Knickerbocker has not established that the relationship between the claimed dimensions is result-effective and the relationship between the claimed dimensions would not have been achieved through routine experimentation.

In rejecting claims 1, 2, 9, 10 and 20-23 over Garcia in view of Knickerbocker, the grounds of rejection state:

Garcia et al. disclose, in fig. 1, a fluid dispenser comprising a fluid reservoir and dispenser member comprising a body 14 defining a chamber; an actuator rod 46; a peripheral bearing collar 511 including a gasket coming into abutment at least indirectly against an edge of an opening of the fluid reservoir; wherein the axial height between the bottom face of the collar and the top end of the actuator rod is substantially equal to the axial height between the bottom face of the collar and the bottom of the body; a dispensing head 4 mounted on top of the rod; a cover hoop 5; and a piston 48 sliding in a top section disposed entirely outside of the neck of the reservoir.

\* \* \*

Knickerbocker teaches disclose a neck of a reservoir having an axial height being equal to the axial height between a bottom face of a collar and a top end of the actuator rod, and a axial height between the bottom face of the collar and the bottom of the body.

(Final Office Action, dated Sept. 10, 2008, at page 3.)

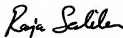
Regarding claims 1 and 2, Garcia does not disclose at least “wherein the axial height HS1 between the bottom face of the collar and the top end of the actuator rod is substantially equal to the axial height H11 between the bottom face of the collar and the bottom end of the body.” The Examiner alleges that Figure 1 of Garcia discloses a fluid dispenser where HS1 approximately equals H11. Once again, Garcia does not indicate that Figure 1 is made to scale nor does it describe any quantification of the dimensions of the device in the specification. Therefore, Garcia also cannot be properly considered as disclosing the relationships between the claimed dimensions.

Further, the Examiner acknowledges that Garcia does not disclose “an axial height [of the neck HC] being equal to the axial height between the bottom face of the collar and the top end of the actuator rod [HS1]. . .” The Examiner relies on Knickerbocker as disclosing such features. As discussed above, however, Knickerbocker does not disclose HC as being equal to HS1. Again, referring to the annotated Figure of Knickerbocker,  $HC \neq HS1$ . Nor would it have been obvious through routine experimentation to create the claimed relationship between the dimensions because the relationships have not been identified as result-effective variables.

### III. Conclusion

For the reasons presented above, Applicant respectfully submits that the claims are patentable, and accordingly, that the final rejection is improper. Applicant respectfully requests the Panel to reverse the final rejection and allow the application with the pending claims.

Respectfully submitted,



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CUSTOMER NUMBER

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